

**REMARKS**

Claims 1, 3-8, 21-23, 25-30, and 53-54 are currently pending. No Amendments have been made by this submission.

**Rejections under 35 U.S.C. § 102(b)**

Claims 1, 3-8 and 53 stand rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by the teachings of U.S. Patent Application Publication US2002/0134486 (hereinafter “Brumbelow”). In rejecting these claims, the Examiner contends that the claimed feature of a foam cushion backing having a thickness of greater than 0.075 inches (as set forth in independent Claim 1), although not specifically taught, is inherently present in the teachings of Brumbelow. Applicant respectfully disagrees.

As noted in section five of the Office Action, the Examiner’s inherency rejection is based on Brumbelow’s paragraph [0133] which states in its entirety:

Measured another way, the thickness of an unexpanded, collapsed extrusion coated adhesive backing material is in the range from about 6 to about 80 mils, preferably from about 10 to about 60 mils (about 0.25 to about 1.52 mm), more preferably from about 15 to about 50 mils (about 0.38 to about 1.27 mm), and most preferably from about 20 to about 40 mils (about 0.51 to about 1.02 mm).

In view of this paragraph, the Examiner concludes that Brumbelow “clearly teaches the adhesive backing layer prior to foaming or expansion (i.e., unexpanded, collapsed extrusion coated adhesive backing material) may be about 6-80 mils thick. Since activation of the blowing agent will inherently increase the thickness thereof, applicant's limitation of at least 75 mils thick is anticipated by at least Brumbelow's teaching of 75-80 mils prior to expansion. Hence, claims 1, 3-8, and 53 are rejected as being anticipated by the cited Brumbelow reference.”

In forming this conclusion, the Examiner has made several improper assumptions that are not supported by the actual teachings of the reference. First, the Examiner has assumed that a blowing agent is present in the unexpanded, collapsed extrusion coating

described in paragraph [0133]. To that end, it appears the Examiner assumes the terms “unexpanded” and “collapsed” indicate a blowing agent is present. However, there is no teaching or suggestion in Brumbelow that would indicate a blowing agent is necessarily present in the unexpanded, collapsed extrusion coating described in paragraph [0133]. Second, the Examiner has also assumed that, in the event a blowing agent is present in the unexpanded, collapsed extrusion coating described in paragraph [0133], the coating alleged to have been expanded was at least 75 mils thick rather than in the range of 6 to 74 mils thick. Once again, there is no teaching or suggestion that would indicate this is necessarily so. Third, even assuming *arguendo* that both prior assumptions were true, the Examiner has further improperly assumed that the unexpanded, collapsed extrusion coating described in paragraph [0133] was actually expanded to provide a foam. Once again, however, there is no teaching or suggestion that would indicate the coating described in paragraph [0133] was necessarily expanded to provide a foam as suggested by the Examiner.

It is well settled that any reliance on a theory of inherency requires a showing that the missing feature or features, *i.e.*, providing a foam cushion backing having a thickness of greater than 0.075 inches must necessarily exist. In view of the foregoing remarks, it is impossible for the Examiner to satisfy this burden as there is no teaching or suggestion in Brumbelow that would indicate an unexpanded, collapsed extrusion coating, such as that described in paragraph [0133], necessarily contained a blowing agent, necessarily had a thickness of at least 0.075 inches, and necessarily was expanded to provide a foam having a thickness greater than 0.075 inches. For at least these reasons, Brumbelow fails to anticipate the claims

Notwithstanding the patentability of the foam thickness feature addressed above, claims 1, 3-8, and 53 further recite the patentability distinct feature that the foam cushion is substantially uncrosslinked. To that end, the Examiner recognizes that Brumbelow is silent with respect to crosslinking of a polymer composition. In view of this silence, the Examiner nonetheless continues to allege that due to Brumbelow’s silence on crosslinking, the composition of Brumbelow must inherently be substantially uncrosslinked. Applicant respectfully disagrees.

A reference's silence on a given feature is not proper support for a determination or presumption that said feature inherently exists or would otherwise be obvious. As noted above, it is well settled that inherency requires a showing by the Examiner that the missing feature must necessarily exist. Here, the Examiner's reasoning is premised on the assumption that Brumbelow's failure to describe a process for affirmatively crosslinking indicates the compositions disclosed therein are inherently uncrosslinked. However, a reference's silence with respect to a claimed feature is not sufficient objective reasoning to shift the burden of showing whether a missing element was inherently present to the applicant. An examiner must rely upon the teachings of a reference as a whole, not on what a reference fails to teach. Accordingly, for at least this reason, the Examiner has failed to satisfy the requisite burden of establishing that the compositions of Brumbelow are inherently uncrosslinked. Applicant therefore respectfully requests that the rejection of claims 1, 3-8, and 53 be withdrawn.

**Rejections under 35 U.S.C. § 103(a)**

Claims 21-23, 25-30 and 54 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious and unpatentable over the teachings of U.S. Patent Application Publication US2002/0134486 (hereinafter "Brumbelow") in view of Applicant's alleged own admissions concerning the Examiner's prior taking of Official Notice with respect to the use of resilient polymers in polyolefin compositions. Applicant respectfully disagrees.

In presenting this rejection, the Examiner gives Official Notice to the alleged fact that it is well known in the art to add resilient polymers to polyolefin compositions in order to improve impact resistance. Therefore, the Examiner contends it would have been obvious in view of this Official Notice for one of ordinary skill in the art to incorporate the resilient materials and said amounts of same as set forth in claims 21-23, 25-30 and 54 into the invention of Brumbelow in an effort to improve the impact resistance of Brumbelow's foam layer.

Contrary to the Examiner's assertion, Applicant has not conceded the Examiner's Official Notice as prior art. Applicant previously traversed the rejection on the grounds that Brumbelow failed to teach or suggest a foam layer having a thickness greater than

0.075 inches and a foam that is substantially uncrosslinked. Irrespective of what Official Notice the Examiner may provide with respect to the use of resilient polymers and irrespective of whether or not the Examiner considers Applicant's prior response as an Admission of said Official Notice, the fact remains that for the reasons previously provided above Brumbelow fails to teach or suggest a foam layer having a thickness greater than 0.075 inches and which is substantially uncrosslinked. Therefore, it could not have been obvious in view of Brumbelow, as the Examiner suggests, to incorporate a resilient material into a substantially uncrosslinked foam layer having a thickness greater than 0.075 inches. Applicant therefore respectfully requests that the rejection of claims 21-23, 25-30 and 54 be withdrawn.

**CONCLUSION**

In view of the foregoing Amendments and Remarks, it is respectfully asserted that the rejections set forth in the Office Action of September 29, 2009, have been overcome and that the application is in condition for allowance. Therefore, Applicant respectfully seeks notification of same.

Respectfully submitted,

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